

The Mailing Preference Service: MPS File Licence

DATE:

PARTIES:

(1) **THE MAILING PREFERENCE SERVICE LTD** whose registered office is at DMA House, 70 Margaret Street, London W1W 8SS ("Licensor"); and

(2) _____
whose registered office is at _____
("Licensee")

RECITALS

- (A) The Licensor is the proprietor of the MPS File.
- (B) The Licensee wishes to receive a licence on the terms and conditions of this agreement in order to Use the information contained in the MPS File.

OPERATIVE PROVISIONS

1. Definitions

In this agreement the following words and expressions shall have the following meanings:

"Appeals Commissioner"

The person appointed by the Direct Marketing Association (UK) Ltd to hear an appeal by the Licensor or Licensee on natural justice grounds against an adjudication by the Direct Marketing Authority;

"Code of Practice"

The current version in force from time to time of The British Code of Advertising, Sales Promotion and Direct Marketing (CAP Code)

"Data Protection Legislation"

Any UK data protection legislation in place from time to time, including the provisions of the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003 together with any regulations or codes of practice made thereunder.

"Direct Marketing Authority"

The independent body to which a breach of this agreement may be referred by the Licensor, at the request of the Licensor or Licensee, for adjudication;

"File Update"

Any update of the MPS File prepared by the Licensor including but not limited to a revised version of the whole MPS File or any additional file issued by the Licensor to be used in addition to the MPS File;

"Group Companies"

The Licensee's subsidiaries, UK holding company and any subsidiaries of its holding company, such terms having the meaning given to them within the Companies Act 1985;

"Licence"

A non-exclusive licence to Use the MPS File during the Term on the terms of this agreement;

"Licence Fee"

The annual fee to be paid for Use of the MPS File, as notified by the Licensor in advance each year;

"MPS File"

A computer file including all File Updates of names and addresses of consumers who are registered with the Licensor and which consists of the following lists: (a) Suppression List – a list of surnames and addresses of consumers who have registered a wish to reduce the quantity of Promotional Mailings they receive; (b) Deceaseds List – a list of surnames (together with initials) and addresses of consumers who have been registered as deceased; and (c) Mailing List – a list of

surnames (together with initials) and addresses of consumers who have asked to receive Promotional Mailings relating to specific categories of products only.

"Promotional Mailings"

Any unsolicited communication sent by post for direct marketing purposes;

"Royalty"

The amount payable by the Licensee for Third Party Use, calculated by multiplying the number of Third Party Uses by the value of the License Fee;

"Term"

This Licence commences on the date it is signed by both parties and shall remain in force on a rolling annual basis until terminated in accordance with clause 6;

"Third Party Use"

Use by a third party of the MPS File provided by the Licensee as part of the Licensee's screening software. Each copy of the MPS File provided by the Licensee to a third party shall constitute a single Third Party Use; and

"Use"

The Use of the MPS File by the Licensee either on its own behalf or for the purpose of Third Party Use for the purpose only of: (a) suppressing from mailing lists used by the Licensee for Promotional Mailings the details of consumers registered with the Suppression List or Deceaseds List of the MPS File; or (b) adding to mailing lists used by the Licensee for Promotional Mailings the details of consumers registered with the Mailing List of the MPS File.

2. Grant of licence

The Licensor in consideration of the payment by the Licensee of the Licence Fee and any applicable Royalty Fee hereby grants to the Licensee and its Group Companies the Licence and undertakes to provide to the Licensee all File Updates existing from time to time during the Term.

3. Licensee Obligations

3.1 The Licensee shall at all times during the Term:

- 3.1.1 use the MPS File only for the purposes of Use and for no other purpose whatever;
- 3.1.2 ensure that where a File Update is provided in the form of an additional file, it shall Use the additional file only as an update to, and only in conjunction with, the MPS File;
- 3.1.3 ensure that where a File Update is provided in the form of a revised version of the whole MPS File, it shall forthwith destroy all data held on the MPS File which has been replaced;
- 3.1.4 ensure that it complies with Data Protection Legislation and all other applicable laws, regulations and Code of Practice;
- 3.1.5 ensure that it does not send any Promotional Mailings to any address listed within the MPS File registered to a consumer registered with the Licensor;
- 3.1.6 apply all appropriate technical and organisational measures in compliance with Data Protection Legislation to keep the MPS File secure and to protect against any unauthorised or unlawful processing of the MPS File or its accidental loss or destruction;
- 3.1.7 pay the Licence Fee together with any applicable Value Added Tax upon signature of this Licence and also pay the Licence Fee on each subsequent anniversary of the commencement date of this agreement in order to renew the Licence for a further year;
- 3.1.8 inform the Licensor on a monthly basis in the manner prescribed from time to time, of the number of third parties the Licensee has provided the MPS File to by way of Third Party

Use and pay the Licensor the applicable Royalty Fee in addition to the Licence Fee. Any applicable Royalty Fee will be invoiced by the Licensor on a monthly basis and shall be payable either by the Licensee within 30 days of [the Licensee's receipt of / the date of] any such invoice or by the third parties concerned if the Licensee provides the Licensor with their details; and

3.1.9 permit the Licensor (by its own personnel or by a suitably qualified independent auditor) access to enter its premises in order to audit or otherwise monitor the management of the MPS File at any time during the Term of this agreement. A minimum of 48 hours notice will be given by the Licensor before such a visit.

3.2 The Licensee shall not: -

3.2.1 copy the whole or any part of the MPS File, although the Licensee is permitted to make one copy of the MPS File for use in the event that the Licensee's IT systems fail and an electronic copy of the MPS File is lost or destroyed;

3.2.2 modify, merge or combine any part of the MPS File with any other information which the Licensee may have; or

3.2.3 assign, transfer, sell, lease, rent, charge or otherwise deal in or encumber the MPS File nor disclose the MPS File to any third party that is not a Group Company or a subcontractor responsible for the Use of the MPS File on behalf of the Licensee or other than through the Third Party Use permitted in accordance with this agreement.

3.3 The Licensee undertakes to keep the Licensor fully informed as to the identity of all Group Companies and subcontractors that have access to the MPS File from time to time, and the Licensee undertakes to procure that the MPS File shall only be used by Group Companies, subcontractors and employees in accordance with the terms of this Licence.

4. Confidentiality and intellectual property rights

4.1 The Licensee acknowledges that the MPS File contains confidential information belonging to the Licensor and any intellectual property rights vesting in the MPS File are the exclusive property of the Licensor.

4.2 The Licensee shall:

4.2.1 keep confidential the MPS File and limit access to the same to those of its employees, agents and sub-contractors who either have a need to know or who are engaged in the Use of the MPS File;

4.2.2 maintain an up to date written record of all Use of the MPS File under this Licence and upon request forthwith produce such records to the Licensor; and

4.2.3 without prejudice to the foregoing take all such other steps as shall from time to time be necessary to protect the confidential information and intellectual property rights of the Licensor in the MPS File.

5. Limitation on Licensor's Liability

5.1. The Licensee agrees to indemnify and hold harmless the Licensor against any and all liability, loss, damage, costs and expenses which the Licensor may incur or suffer whether direct or consequential as a result of any dispute or contractual, tortious or other claims however arising as a result of a breach of this Licence by the Licensee.

5.2 Neither party excludes liability for death or personal injury arising as a result of the negligence of its employees, agents or authorised representatives.

5.3 Except as provided in clause 5.2, the Licensor shall not be liable to the Licensee for any damages, losses, expenses, costs (including reasonable legal expenses) or charges that the Licensee may suffer in connection with the Use of the MPS File to the extent that such loss is (a) indirect, consequential, special or of a type that would not normally be expected to flow from the relevant breach or negligence or

other default of the defaulting party or (b) special, punitive, aggravated or exemplary damages; or (c) loss to the extent that it is a loss of indirect profits, or anticipated savings.

5.4 Except as provided for in clause 5.2, the Licensor's liability to the Licensee shall to the extent permissible by law not exceed the Licence Fee paid by the Licensee for the year concerned.

5.5 Save as expressly referred to in this Licence, representations or warranties of any kind, either express or implied, regarding this Licence are excluded by the Licensor to the extent permitted by law.

6. Termination

6.1 The Licensor shall be entitled to terminate this Licence forthwith if in the reasonable opinion of the Licensor, or the Information Commissioner or Appeals Commissioner as the case may be, the Licensee has failed to comply with this Licence.

6.2 If the Licensee fails to pay any Licence Fee or Royalty Fee on the due date for payment this Licence shall terminate automatically.

6.3 Immediately upon termination for whatever reason, the Licensee shall deliver up to the Licensor all copies of the MPS File in the possession of either the Licensee, its Group Companies or subcontractors.

7. General

7.1 In the event of a breach of the Licence, the Licensor (or the Direct Marketing Authority and/or the Appeals Commissioner as the case may be), retains the right to issue a public statement to that effect at its sole discretion upon prior notice to the Licensee.

7.2 The failure of either party to enforce or to exercise at any time or for any period any right pursuant to this Licence shall not be construed as a waiver of any such term or right and shall in no way affect that party's right later to enforce or exercise it.

7.3 A person who is not a party to this agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Licence.

7.4 Neither party shall be deemed to be in breach of this Licence, or otherwise be liable to the other, by reason of any delay in performance or non-performance of any of its obligations under this Licence to the extent that such delay or non-performance is due to any cause beyond its reasonable control including but not limited to the acts, defaults or omissions of suppliers or sub-contractors or strike, lockout or other form of industrial action (an "Event of Force Majeure"). The party affected by an Event of Force Majeure shall immediately give the other party written notification of the nature and extent of the Event of Force Majeure and the parties shall enter into bona fide discussions with a view to alleviating its effects or to agreeing upon such alternative arrangements as may be fair and reasonable.

7.5 This Licence constitutes the entire agreement and understanding of the parties relating to the subject matter of this Licence. Each party agrees that it has not been induced to enter into this Licence in reliance upon any warranty, representation, statement, agreement or undertaking of any kind (whether negligently or innocently made) of any person other than as expressly set out in this Licence. Nothing in this clause 7.5 shall, however, operate to limit or exclude any liability for any fraudulent statement or act. No variation of this Licence shall be valid unless it is in writing and signed by or on behalf of each of the parties.

7.6 Any notice to be given under this Licence by either party shall be in writing signed by or on behalf of the party giving it and (i) delivered personally, (ii) sent by prepaid recorded delivery post to the address of the party as set out in this Licence or as otherwise notified in writing from time to time to the other party or (iii) sent by fax to the number of the other party as notified in writing from time to time. Notice shall be deemed

to be received if delivered personally at the time of receipt, if sent by post at the expiration of forty-eight (48) hours after being placed in the post (having been correctly addressed), or if by fax twenty-four (24) hours after despatch to the correct fax number.

- 7.7 The terms and conditions of this Licence are severable in that if any provision is determined to be illegal or unenforceable by any court of competent jurisdiction, such provisions shall be deemed to have been deleted without affecting the remaining provisions of these terms and conditions.
- 7.8 This agreement shall be governed by and construed in accordance with English law and the parties hereto agree to submit to the exclusive jurisdiction of the English Courts.

SIGNED by

for and on behalf of
THE MAILING PREFERENCE SERVICE LTD

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